



Republika e Kosovës
Republika Kosova – Republic of Kosovo
ORGANI SHQYRTUES I PROKURIMIT
TELO ZA RAZMATRANJE NABAVKE
PROCUREMENT REVIEW BODY

Psh. No.900/23

The Review Panel, appointed by the President of PRB, based on Article 105, 106, and 117 of the Law on Public Procurement of the Republic of Kosova (LPP) composed of Vedat Poterqoi - President, deciding according to the complaint of the Economic Operator (EO) "PRO MEDICAL SH.P.K. against the Decision on the contract award to the MUNICIPALITY OF PODUJEVA in the capacity of the Contracting Authority (CA) related to the procurement activity "Supply of medical equipment" with procurement number 615-23-1754-1-1-1, on the 04/01/2024 has issued this:

DECISION

1. **Approved**, as partly grounded the complaint of EO PRO MEDICAL SH.P.K. with no. 2023/0900, dated 13/11/2023, whereas the decision of the CA MUNICIPALITY OF PODUJEVA related to the procurement activity "Supply of medical equipment" with procurement number 615-23-1754-1-1-1 remains in force.
2. The funds deposited in the name of the tariff tax for submitting the complaint to the account of Economic Operator PRO MEDICAL SH.P.K. are returned.

REASONING

- Procedural facts and circumstances -

The Municipality of Podujeva, in the capacity of the Contracting Authority, on the 08.03.2023 has published the Contract Notice - B05, for the procurement activity "Supply of medical equipment" with procurement number 615-23-1754-1-1-1. While on the 27.10.2023 B58 published the Notice on the decision of the Contracting Authority for Lot III, for the above-mentioned activity.

The Contracting Authority for this procurement activity has implemented an open procedure, contract type - supply, estimated contract value 26,000.00 €.

On the 31.10.2023 PRO MEDICAL SH.P.K. submitted a request for reconsideration against the aforementioned decision of CA. On the 03.11.2023, the Contracting Authority rejected the request for reconsideration as unfounded.

On the 13.11.2023, PRB received the complaint from PRO MEDICAL SH.P.K., with no. 900/23 related to the activity "Supply of medical equipment" with procurement number 615-23-1754-1-1-1.

On the stage of preliminary review-

The Review Panel has concluded that the complaint contains all the elements defined through Article 111 of the LPP and as such was submitted within the legal term in accordance with Article 109 paragraph 1 of the LPP after the preliminary procedure for resolving disputes in the sense of Article 108/A of the LPP, from the economic operator who is an interested party according to article 4 paragraph 1 sub-paragraph 26 of the LPP. In this way, the Review Panel has concluded that it is competent to review this complaint according to Article 105 of the LPP and there is no procedural obstacle to proceed with reviewing the complaint in a meritorious manner.

The claims of the complaining economic operator PRO MEDICAL SH.P.K. are presented as follows:

The first claim (I) - The complainant claims that "The object of the offer and the contract with the Contracting Authority cannot be classified as a business secret. Complainant EO Pro Medical has requested access to the tender documents of the recommended EO for Contracts for LOT III in relation to the procurement Activity in question. Based on the answer from the CA representative, access to the information about what equipment was offered, and what is the object of the offer and the contract with the Contracting Authority, was not allowed. Please see the email as evidence that CA has not implemented PRB Decision No. 422-23 and LPP Article 10 paragraph 5."

The second claim (II) - The complainant claims that "The assessment was not made in accordance with the LPP and the reasons mentioned in the LS are not in accordance with the LPP. The CA has not respected even Article 54 of the LPP regarding this procurement activity and in opposition to the RrPP Article 42 because we have not received any clarification from the CA and we have only been eliminated a general Reasoning. Therefore, the CA did not respect paragraph 3, Article 42 of the RrPP, so we were not even able to challenge the Decision of the CA because it did not clarify which position or equipment we did not meet the technical specification, so this denied us the preparation of a REQUEST FOR REVIEW on the basis facts and arguments to oppose the Decision of the CA.

The third claim (III) - The complainant claims that "The reasons mentioned in the LS are not in accordance with the LPP, so we have submitted an email according to the request of the CA in accordance with the email, while you have said that the EO can only take 24 hours, see the email

as evidence, but the CA should bear in mind that the validity period of the tender was 90 days, from 18.04.2023 to 17.07.2023, and from this date it was not valid, while the CA, contrary to the LPP, requested actions from the EO.

Referring to the claims as above, PRO MEDICAL SH.P.K. considers that the Contracting Authority has acted in violation of Article 1, 6, 10, 11, 54 and 59 of the LPP, requesting that the complaint be approved as well-founded, the decision annulled of CA and the procurement activity to be reassessed and to allow access to the documents of the EO Group recommended for Contracts "NERAMED & KO MED.

Relying on article 111 paragraph 5 related to articles 113 and 114 of the LPP, the Review Panel dated 14/11/2023 has authorized the review expert to conduct the initial review of the file and claims according to complaint no. 900/23, while on 26/11/2023 the expert's report with no. 2023/0900 with the following recommendations: "Based on the above-mentioned clarifications, the review expert proposes to the review panel that the matter be treated as a matter judged according to the preliminary decisions of the PRB.."

The expertise report has been duly accepted by all procedural parties. The CA did not agree with the recommendation of the review expert's report, emphasizing "We inform you that WE DO NOT AGREE with the opinion of the expert for case 2023/0900, regarding the appeal claims as follows: Regarding the part of the 1st claim, Object of the offer and the contract with the Contracting Authority cannot be classified as a business secret, - The reason for not agreeing on this point with the expert is because it is the right of the EO to decide which documents can be presented and which remain as a business secret, moreover according to e-procurement, the system during the uploading of documents has the option which allows you to select which documents are classified as secret and which are not. Regarding the part of the claim that the CA must prepare the cleaned version in relation to the documents that are classified as business secret information, which other EOs can access. • The reason for not agreeing with the expert on this point is because the CA has given you access to the documentation of the proposed EO for awarding the contract, moreover, they have presented you with the entire documentation of the proposed EO and you have the opportunity to view the presented documents as a business secret, therefore we are not responsible for why a representative who has no information about the requested (presented) documents came to the access from your side. We, as CA, in the case of accepting the decision by PRBO 2023-0422, acted in accordance with the decision, but it does not mean that the final result will change because the matter has returned to the zero point and that the EO has enabled you to access the documents and has presented all the documentation of the proposed EO and you have the opportunity to view the presented documents as a business secret, therefore we are not responsible why a representative who does not have information about the requested (presented) documents came to us from your side, therefore we ask from the board to reject the EO's appeal and let the decision of the CA remain in force.

while the EO has agreed on the recommendations of the reviewing expert, emphasizing "we agree with the expert's report because the expert has presented the factual situation and the CA has not respected the Decision and recommendation of PRB No. 422/2."

The Review Panel has assessed that the conditions have been met to decide on this case without a hearing in the sense of Article 24 paragraph 1 of the Rules of Procedure of the PRB, taking into account that the claims of the parties and their submissions, the evidence as well as the review expert's report provide sufficient data to decide on the merits of the case.

-Administration and evaluation of evidence -

In order to fully verify the factual situation, the review panel administered as evidence the expert's report, the opinions of the parties related to the expert's report, the submissions and documents of the complainant, the letters and documents of the contracting authority, the relevant documents related to the procurement activity as and all the evidence that has been proposed by the procedural parties.

Regarding the claims PRO MEDICAL SH.P.K., the examining expert through report no. 2023/0900 assessed as follows:

The complaining EO in the complaint submitted to the PRB has raised complaint claims which in advance through decision no. 422/23 issued on 15.09.2023 were dealt with and considered as well-founded. According to the decision of the PRB, the CA requested that the procurement activity be re-evaluated and the notice on the decision of the CA, where the group of EO Neramed & Ko-MED was recommended for the contract for lot III, be cancelled. Findings for approving the complaints as grounded are the same as those presented in the expertise no. 422/23 and in the decision of the Review Panel with no. 422/23 issued on 15.09.2023. Despite the fact that the decision resulted in a re-evaluation, it means that the complaining claims were founded and the CA has an obligation to avoid the violations found in the report of the expertise and in the decision of the OPSH and to correct them through the re-evaluation. But the CA did not change the result in the case of re-evaluation, even though in the sense of Article 29 paragraph 3 of the PRB's Work Regulations, the Contracting Authority has the obligation to notify the PRB within 15 days from the day of acceptance of the decision. related to the outcome of the reassessment process. Based on Article 16 of the Work Regulations of PRBO no. 01/2022 paragraph 2, the Review Expert finds that the complaint claims are the same which have been reviewed before by the Review Panel and I consider that the case should be treated as "Res Judicata".

According to the above, the reviewing expert has handled the case/complaint of the complaining economic operator PRO MEDICAL SH.P.K., and has assessed that the complaining claims are the same for the parties in the procedure with decision No. 2023/0422, therefore they have not been handled/ reviewed.

Findings of the Review Panel -

The review panel independently and objectively, conscientiously and professionally evaluated all the evidence of the case. The review panel after the administration and assessment of the evidence, the complete ascertainment of the factual situation, relying on the LPP as applicable material law, after examining the appeal claims, taking into account all the documents of the case, has found that the appeal should be approved as a partial based. However, the Review

Panel has decided to uphold the CA's decision regarding the procurement activity "Supply of medical equipment" with procurement number 615-23-1754-1-1-1. Due to the fact that the complainant in this case did not extend the validity of the offer and therefore does not provide any argument/evidence, but is only related to the violations of the CA.

In fact (of course, regardless of the recommendations) the Panel notes that the procurement procedure that was applied in this case was not presented in detail in the review expert's expertise report, not explaining all the stages of the process and the actions taken by the parties in the comparative context with the acts in force, especially with the Public Procurement Rules.

Therefore, referring to article 104.1, of the LPP, according to which it is required that the review procedure be implemented in a fast, legal and effective manner and also analyzing in their entirety the documents of this subject in the context of this procurement process, the panel did not consider it necessary to elaborate again in detail and unnecessarily in this case each appeal claim, as long as they are specifically singled out especially in the contested decision of the contracting authority. Among other things, in the review expert's report, no explanations were given regarding the complaining assertions and no accurate findings were made because not all claims are the same. The reasons that the Panel does not fully support the expert's report and I cannot consider it as a judged issue because after the decision of PRBO No. 2023/0422, dated 15.09.2023, CA has returned the procurement activity to re-evaluation, but in the re-evaluation phase, the complaining EO in this case is eliminated for an additional reason, because it did not extend the validity of the offer and in accordance with Article 30.6 of Regulation No. 001/2022 for Public Procurement, quote: "It is open to each EO to decide whether it wants to extend the validity of the tender. EOs that decide not to extend the validity of their tenders will be rejected as "irresponsible" and thus the CA will not I will confiscate their Tender Security". Therefore, the complainant for the review panel is irresponsible because it was not found that he continued the validity of the offer, according to the CA's request.

The reason that this complaint qualifies as partially founded is due to the fact that the complaining assertion regarding the CA that it did not act in accordance with the legal provisions, specifically Article 30.4 of Regulation No. 001/2022 for Public Procurement. Also, the review panel took interpretation no. 7 of the PPRC which can be found on the e-procurement website, because the CA made the request to extend the validity of the offer too late and the offers remained invalid for a long time, but for this the participating EOs cannot be penalized who have extended the validity of the offer in accordance with the CA's request.

Therefore, if the PRB notices that the CA will commit such similar violations, it will address the PPRC with a request to initiate the revocation of the certificate to the responsible procurement official in accordance with article 25, paragraph 8 and 9 of the LPP. This is also due to the fact that the CA Municipality of Podujeva did not act in accordance with the legal provisions and recommendations given by the preliminary decision of PRB No. 2023/0422 by not clearly specifying the reasons why the specifications do not match the catalog provided, but for the review panel now at this stage, due to the non-continuation of the validity of the offer by the appellant, it is irrelevant that the procurement activity should be re-evaluated and the CA should clarify this part.

Consequently, the review panel decides to uphold the CA's decision, which was issued by an evaluation commission which is supposed to be professional. The Review Panel emphasizes that each contracting authority (at the central and local level) enjoys autonomy in procurement planning (Article 8) and in determining the needs that must be met (Article 9), of course in accordance with the budget capacity and that the CA in the specific case has have the right to also decide on the EO recommended for the award of the contract based on article 24 paragraph 2 of the LPP cited "The contracting authority is responsible for ensuring that all procurement activities of such contracting authority are executed in compliance with complete with this law".

The return of a procurement activity without a contested legal basis for re-evaluation is not in harmony with Article 1 of the LPP, according to which, the purpose of this Law is, among others, quoted: "...to ensure the integrity and responsibility of public officials, civil servants and other persons who perform or are involved in a procurement activity, requesting that the decisions of such individuals and the legal and factual basis for such decisions are not influenced by personal interests, characterized by no -discrimination and with a high degree of transparency and to be in accordance with the procedural and essential requirements of this law".

Acting on the basis of the basic principles of procurement review procedures, which, among others, are specifically sanctioned by the provision of Article 104 of the LPP and at the same time analyzing the documents of this case in relation to the facts and circumstances described as above, and especially paying due attention to the nature and purpose of the complaints, the Review Panel took into consideration all the statements of the complainant, the acts and actions undertaken by the CA, the review expert's report and carefully analyzed them all the papers of this case and considers that the complaining assertion of the complaining EO is unfounded and rejected, as given in the findings of the panel.

In making this decision, the review panel also took into consideration the requirements of Article 104, paragraph 4 of the LPP, according to the PRB, it must act as quickly as possible, act proportionally to the alleged violation or the matter for which the complaint is filed, and take as a basis the possible consequences of the actions or measures on all interests that may be harmed, including the public interest.

Therefore, acting in accordance with the powers cited above and Article 104 paragraph 4 in relation to paragraph 1, according to which the procurement review procedure will be implemented and carried out in a fast, fair and non-discriminatory manner, which has aimed at the legal and effective resolution of the case, as well as referring to Article 117 of the LPP, and in the evidence presented above, the Review Panel decided as in the provision of this decision.

President of the PRB

Mr.Vedat Poterqoi

Legal advice:

An appeal is not allowed against this decision,
but the dissatisfied party can appeal to the Commercial Court,
within 30 days from the date of acceptance of this decision.

Decision to be submitted to:

1x1 CA – **MUNICIPALITY OF PODUJEVA;**

1x1 EO – **PRO MEDICAL SH.P.K.;**

1x1 Archive of the PRB;

1x1 For publication on the website of the PRB.